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SUPREME COURT, U.S.

No. 81-5056

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

JOHN E. RUST,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

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I.

OPINION BELOW

State v. Rust, 208 Neb. 320, 303 N.W.2d 490 (1981).

II.

JURISDICTION

Opinion here in question filed, March 20, 1981.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the relevant citations.

IV

QUESTIONS PRESENTED

The respondent accepts the petitioner's statement of the questions presented.

V.

STATEMENT OF THE CASE

The respondent accepts the petitioner's statement of the case.

VI.

ARGUMENT

A.

THE STATE COURT'S FINDINGS OF FACT SHOULD BE RESPECTED.

The petitioner is now attempting to escape ultimate responsibility for the act which a jury found beyond a reasonable doubt he had committed, based upon the exculpatory testimony, at the post-conviction hearing, of a Mr. Ells, his partner in crime. The petitioner claims Ells' testimony was inherently credible. The state trial court found to the contrary and the Nebraska Supreme Court affirmed that finding. In such factual determinations deference should be paid to the fact finder's enhanced opportunity to observe the witness and evaluate his testimony. In Glasser v. U.S., 315 U.S. 60 (1942), this court stated, "It is not for us to weigh the evidence or to determine the credibility of witnesses. The

verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Id. at 80. We believe there to be substantial evidence to uphold the sentence announced by the court.

B.

THE RESPONSIBILITY FOR INTERPRETING STATE LEGISLATIVE ENACTMENTS RESTS WITH THE STATE COURTS.

This is not the proper forum in which to review the interpretation of a state legislative enactment by that state's highest court. Yet, that is exactly what the petitioner requests this court to undertake with respect to Neb.Rev.Stat. §29-2521.01, et seq. (Reissue 1979). Questions concerning the interpretation of that enactment have been resolved in State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980), cert denied, ___ U.S. ___, 66 L.Ed.2d 117 (1980).

The appropriate question may be whether the penalty of death was properly imposed by the State of Nebraska in the petitioner's case. Nebraska has enacted and employs a complex sentencing scheme in order to avoid the arbitrary imposition of this penalty. The petitioner has enjoyed the full benefits of that system. Multiple petitions for certiorari to this court have yet to result in a finding that further review of Nebraska's sentencing scheme is necessary. To the extent that the petitioner articulates an issue appropriate for consideration in this forum, he fails to indicate that any infringement of his rights has occurred. So long as the State of Nebraska accurately applies a constitutionally adequate sentencing procedure, we fail to see how the petitioner has been prejudiced.

II.

A.

THE AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED IN A DEATH PENALTY CASE, AS DEFINED BY THE NEBRASKA SUPREME COURT, ARE CONSTITUTIONALLY ADEQUATE.

The petitioner claims that the mitigating and aggravating circumstances specified in Neb.Rev.Stat. §29-2523 (Reissue 1979) are vague and indefinite. The Nebraska Supreme Court

has had several opportunities to review and discuss the circumstances. The court has concluded that the enumerated circumstances are not unconstitutionally vague. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 381 (1977); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977). In each of these cases, the Nebraska Supreme Court discussed the specific aggravating and mitigating circumstances of §29-2523. The court clearly defined and explained the permissible boundaries of each and every one of these factors. We believe if the language of these cases is reasonably applied to the language of the statute, they become as precise as it is possible for words to be. None of the above cases have been granted relief by this Court upon a petition for writ of certiorari. We believe the wording and interpretation of all the aggravating and mitigating circumstances are sufficiently definite to meet any and all constitutional tests.

B.

THE MITIGATING CIRCUMSTANCES WHICH MAY BE CONSIDERED BY THE SENTENCING COURT ARE NOT LIMITED BY STATUTE.

The Nebraska statutes here in question provide for the adequate consideration of any mitigating circumstance and comply with the rulings of this Court in Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978). While §29-2523 sets out specific aggravating and mitigating circumstances which are to be considered by the court prior to passing sentence, §29-2523 provides:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 25-2523. Any such evidence which the court deems to have probative value may be received. . . . (Emphasis added).

Lockett v. Ohio, supra, requires that the statutes in question not preclude a sentencing court from considering any aspect of a defendant's character as mitigating. The sections of the Nebraska statutes here in question do not, on their face or as interpreted by our state's supreme court, preclude the

consideration of such evidence. State v. Holtan, Id. 205 Neb. at 318.

The evidence which the petitioner sought to introduce as a mitigating circumstance was accepted and considered by the sentencing court. The sentencing court, however, evidently failed to find that the evidence offered "approach[ed] or exceeded the weight given to the aggravating circumstances." §29-2522.

C.

SO LONG AS CONSTITUTIONALLY ADEQUATE CRITERIA ARE ACCURATELY APPLIED BY THE SENTENCING ENTITY, THE COMPOSITION OF THAT ENTITY DOES NOT RAISE ISSUES OF A CONSTITUTIONAL MAGNITUDE.

The petitioner questions the propriety of the statutory mechanism in Nebraska which allows the determination of the penalty to be imposed upon a person found guilty of murder in the first degree to be made by the presiding judge or, upon the presiding judge's request, by a panel of the presiding judge and two additional judges designated by the chief justice of our state supreme court. Neb.Rev.Stat. §29-2520 (Reissue 1979). The petitioner claims that this procedure violates his rights to due process and equal protection of the laws. However, the petitioner cites absolutely no authority for this proposition.

The procedures established by the Nebraska statutes for the possible imposition of the death penalty have not been found to be constitutionally deficient in any respect. The statutes establishe criteria to be considered (§§29-2521 and 29-2523) and the balancing to occur between them (§29-2522). Section 29-2522 further provides:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

These requirements are applicable regardless of whether the presiding judge or the three-judge panel is determining the sentence.

It is important to note that the petitioner does not here challenge the standards under which the sentencing decision is made in this state. If the standards applied are not challenged and the application of those standards must comply with the provisions of §29-2522 regardless of the make-up of the sentencing forum, we simply fail to see any merit to the petitioner's assertions.

Finally, the petitioner's contention that the decision regarding the composition of the sentencing entity is not reviewable on appeal is unfounded. Although the decision to call a panel rests within the trial court's discretion, we are aware of no reason that such a decision could not be challenged on appeal. However, the petitioner did not raise that issue on his appeal.

III.

THE CAPITAL SENTENCING PROCEDURES ADOPTED BY THE NEBRASKA LEGISLATURE IN RESPONSE TO FURMAN HAVE ELIMINATED THE DANGERS OF ARBITRARINESS AND CAPRICE IN SENTENCING THAT WERE HELD IN FURMAN TO BE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Furman, supra, decision while not holding that the death penalty was per se violative of the United States Constitution, did recognize that the penalty of death was different in kind from any other punishment imposed under our system of criminal justice. It was clear that the court in Furman held that the death penalty could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. In that opinion, Mr. Justice White concluded that:

> . . . the death penalty is exacted with great infrequency even for the most atrocious crime and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

(408 U.S. at 313.)

Also in the Supreme Court's decision in Furnam it was said:

> The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

(408 U.S. at 309-310.)

Furman mandates that where discretion is afforded a sentencing body on an issue so grave as the determination of whether or not a defendant's life should be taken or a term of imprisonment imposed, that discretion must be appropriately guided and directed so as to minimize the risk of wholly arbitrary and capricious action. The Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), said:

> . . . We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and the propensities of the offender.' . . .

(Id. at 187.) The Supreme Court in Gregg, supra, after discussing the vital need for accurate sentencing information said:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevan to the imposition of sentence and to provide with standards to guide its use of the information.

(Id. at 195.)

Having been shown that the constitutional objections expressed in Furman can be satisfied by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with statutes to guide its use of the information, it now becomes necessary to determine whether or not the Nebraska sentencing procedures meet the objections expressed in Furman. On July 2, 1976, the same day that the United States Supreme Court decided the previously mentioned case of Gregg v. Georgia, supra, this court also decided the case of Proffitt v. Florida, 428 U.S. 242 (1976). In the Proffitt case, this court upheld the Florida procedures for imposition of the death penalty as against the allegations that it was constitutionally infirm. The Florida procedure is very similar to that procedure enacted by the Nebraska Legislature. The only significant difference is that in the

Florida procedure the jury, at the conclusion of the hearing, is directed to consider, "whether sufficient mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist; and . . . [b]ased on those considerations, whether the defendant should be sentenced to life or death." In Florida, the jury's verdict is determined by a majority vote. The jury's decision as to the imposition of the death penalty is only advisory; the actual sentence, as under Nebraska procedure, is determined by the trial judge. Under the Florida procedures the trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed. As in Nebraska's procedure, the trial court in Florida whenever it imposes a sentence of death is required to set forth in writing the findings upon which the sentence of death is based as to the fact that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The Florida procedure, also like Nebraska's procedure, provides for an automatic review by the state supreme court.

The Court in Proffitt v. Florida, supra, said:

> Under Florida's Sentencing Procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. . . .

Id. at 253. This court concluded that:

> . . . [I]n Florida, as in Georgia, it is no longer true that there is 'no meaningful basis for distinguishing a few cases in which [the death penalty] is imposed from the many cases where it is not.' [Citations omitted.] On its face, the Florida system thus satisfies the constitutional deficiencies identified in Furman.

Id.

The petitioner argues that the new Nebraska sentencing procedures do not eliminate the arbitrary infliction of death that was condemned in Furman. The petitioner notes that on the face of the statute, the death sentence is not mandatory. The state does not argue that point and would point out that the United States Supreme Court in Woodson v. North Carolina,

428 U.S. 280 (1975), and Roberts v. Louisiana, 428 U.S. 325 (1975), held that mandatory death statutes which treat all persons convicted of a designated offense as members of an undifferentiated class and not as individuals were constitutionally infirm. The newly enacted Nebraska statutes specifically give the sentencing authority discretion in its decision to impose the death sentence or a sentence of life imprisonment, however, the Legislature did establish mandatory standards which serve to guide the sentencing court's discretion. Just such a procedure was affirmed in Proffitt v. Florida, supra.

B.

WE BELIEVE THE PETITIONER'S CONCERNS REGARDING THE ISSUE OF COMPARATIVE SENTENCING HAVE ALREADY BEEN ADDRESSED IN ARGUMENT I.B. OF THIS BRIEF.

The petitioner argues that he is somehow denied due process where he is not informed of the aggravating circumstances to be argued by the state. He states no direct authority for that proposition, nor are we aware of any. The duty of the defense is to present all mitigating factors possible. We fail to see how that burden could be reduced by affording the appellant the process he argues for here. There is no indication or argument that the statutory procedures were not complied with in the courts below.

IV.

A.

NEBRASKA'S DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Petitioner's arguments I and IV complain that the death penalty, as a possible sentence under the Nebraska statutes, constitutes cruel and unusual punishment. This court in Furman v. Georgia, 408 U.S. 238 (1972), did not hold that the imposition of the death penalty in all circumstances offends the Eighth Amendment.

On July 2, 1976, this court in the case of Gregg v. Georgia, 428 U.S. 153 (1976), finally resolved the issue of whether or not capital punishment is per se "cruel and unusual" punishment. This court said:

> We hold that the death penalty is not a form of punishment that may never be imposed regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

Id. at 187.

This court found, in assessing a punishment selected by a democratically elected Legislature against the constitutional standard, that the validity of the punishment must be presumed. This court indicated that this was true partly because the constitutional test is intertwined with an assessment of contemporary standards and that in a democratic society legislatures, not courts, are constituted to exhibit the moral values of the people. Although an attempt was made to repeal the death penalty in Nebraska, the final result of that process left the death penalty in effect.

B.

DEATH BY ELECTROCUTION IS CONSTITUTIONAL.

The petitioner asserts that death by electrocution is unconstitutional. He cites no legal authority to support this conclusion. Punishment is cruel when it involves torture or lingering death. Inflicting the punishment of death by electricity has long been recognized within the legitimate sphere of legislative power of the state. Ex parte Kemmler, 136 U.S. 436 (1890). The proper mode for implementing change here would be in the legislative arena.

V.

THE APPELLANT WAS NOT DENIED ADEQUATE ASSISTANCE OF TRIAL COUNSEL.

The record of this case fails to contain adequate evidence from which could be concluded the petitioner's trial counsel failed to perform at least as well as a lawyer with ordinary skill in the criminal law in this area would have performed, or that trial counsel completely failed in conscientiously protecting the interests of his client. Absent such a showing, the petitioner was denied post-conviction relief on the basis of prejudicially ineffective assistance of trial counsel. The alleged errors simply are not supported by the record.

VI.

LACK OF JURY INVOLVEMENT IN THE SENTENCING DECISION DOES NOT VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The petitioner claims the sentencing portion of the death penalty statutes are unconstitutional due to the lack of jury participation in the sentencing decision. This court in Proffitt v. Florida, 428 U.S. 242 (1976), stated: "Judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." In that case, this court upheld the Florida death penalty statutes which are, in all relevant aspects, identical to Nebraska's. This court specifically stated that such statutes provide all the safeguards required by Furman v. Georgia, 408 U.S. 238 (1972).

Whether sentencing by the court or sentencing by the jury is the preferable system is not the question here. The question is whether Nebraska's system of court-determined sentences somehow violates the appellant's constitutionally guaranteed rights. The petitioner fails to point to any constitutional language mandating jury involvement in sentencing, or explain how this argument can be made consistent with the holdings of Furman v. Georgia, supra. This argument fails to explain why jury sentencing is required now when that notion was rejected in Proffitt v. Florida, supra.

VII.

THE TRIAL COURT COMMITTED NO ERROR IN OVERRULING THE DEFENSE OBJECTION TO THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT.

During closing arguments, the prosecutor stated that the defendants (John Edward Rust and Ronald Ell were being tried jointly) were seeking the protection of the constitution but would not in any way accept any other responsibility or the duties that those constitutional rights entail. The defendant argues that this statement inferentially referred to the

failure of the defendant to testify and explain his defense. It is the state's position that the comments by the prosecutor were in no way directed to or meant to call attention to the defendant's failure to testify in his own behalf.

The defendant in his brief fails to point out that when his objection was overruled and the prosecutor was allowed to continue his statement that the completed statement makes it quite clear that the prosecutor was not by any stretch of the imagination referring to the defendant's failure to testify in his own behalf. Instead, the completed statement clearly shows that what the prosecuting attorney was referring to was the defendant's failure to in any way accept the responsibility to live the life of a law-abiding citizen. The prosecutor was assailing the position of the defendants that they should be acquitted because the victim, by coming to the aid of police, did more than the Constitution required of him.

The prosecutor's train of thought, when viewed as a whole and without the interruption caused by the defendant's objection, clearly did not make reference to the defendant's failure to take the stand and testify on his own behalf. There is not even an oblique reference to his failure to take the stand and the state would argue that his comments were in no way improper and that the court properly ruled upon the defendant's objection. It is our continued belief that the trial court did not commit reversible error on this point.

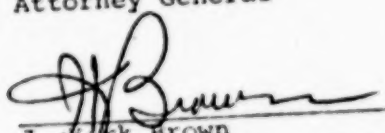
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEBRASKA,
Respondent,

By PAUL L. DOUGLAS
Attorney General

By 

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